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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 WAYMO LLC,

21 CASE NO. 3:17-cv-00939

22 Plaintiff,

23 **PLAINTIFF WAYMO LLC'S RESPONSE
24 TO DEFENDANTS' MOTION IN LIMINE
25 NO. 26 TO EXCLUDE REFERENCE TO
26 DOWNLOADING OF 14,000 FILES**

27 vs.

28 UBER TECHNOLOGIES, INC.;
OTTOMOTTO LLC; OTTO TRUCKING
LLC,

Defendants.

29 Date: September 27, 2017
30 Time: 8:00 a.m.
31 Ctrm: 8, 19th Floor
32 Judge: Honorable William H. Alsup
33 Trial Date: October 10, 2017

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1 Defendants' motion rests on the unsound proposition that where there are disputed facts
 2 about a key issue, the issue should be decided summarily (and in Defendants' favor) and hidden
 3 from the jury rather than tried before it. Defendants provide no rationale or case law for this
 4 remarkable proposition. Instead, Defendants' motion mostly consists of their theory of the case
 5 that the 14,000 files were supposedly not valuable. Obviously, this interpretation is hotly
 6 contested. Waymo will demonstrate to the jury the significant value of the files, which is an
 7 obvious conclusion from Levandowski's secret theft of them. As the Court observed early on,
 8 "why would he take them if they didn't have some valuable information in there?" (Dkt. 160, 4/5
 9 Hr'g at 12:6-10.) Defendants provide no basis for why the Court should adopt Defendants'
 10 position wholesale and bar Waymo's evidence of Levandowski's download and the value of those
 11 materials. Lacking reasoned legal argument, Defendants instead make groundless allegations of
 12 misconduct such as "stonewalling" and bringing a case "based on a lie." The Court should deny
 13 the motion in its entirety.

14 **BACKGROUND**

15 On March 10, 2017, in support of its PI motion, Waymo submitted Gary Brown's
 16 declaration detailing the forensic evidence against Levandowski. (Dkt. 25-29.) At Mr. Brown's
 17 deposition two weeks later, counsel for Waymo made clear, over Defendants' objection, that
 18 Waymo waived privilege only to the extent that Mr. Brown disclosed his investigation in his
 19 declaration. (Ex. 01, Brown PI Dep. at 39:3-41:12.) During a meet-and-confer on April 10,
 20 Waymo reiterated that it claimed privilege over "any other investigation beyond the scope of [Mr.
 21 Brown's] declaration." (Ex. 02, 4/10 email.) Defendants did not challenge this scope for more
 22 than four months, then on August 11 moved to compel additional communications relating to
 23 Waymo's forensic investigation of Levandowski. (Dkt. 1163.) On August 18, the Court found a
 24 narrowly-tailored subject-matter waiver and ordered production of documents concerning the
 25 forensic investigation. (Dkt. 1272.) Waymo produced those documents, and when Otto Trucking
 26 complained that Waymo had delayed, the Court dismissed the timing issue as a creature of
 27 Defendants' own making: "Mr. Chatterjee, the reason we are [at the close of fact discovery] is

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1 because you didn't bring this motion [to compel privileged documents] to my attention until later,
2 so that I don't want to hear." (Dkt 1414, 8/28 Tr. at 13:20-24.)

3 Waymo’s production included emails from Waymo engineer Sasha Zbrozek, a radar
4 engineer who knew nothing substantive of Mr. Brown’s investigation. The emails contained
5 statements that Otto Trucking reads as casting doubt on Waymo’s case, but Mr. Zbrozek has
6 explained that Otto Trucking misunderstands the context of the emails. At his September 6
7 deposition, Mr. Zbrozek clarified that by “low-value” he meant only that the SVN database held
8 data “considered of lesser value” than personal user data and Google source code. (Ex. 04,
9 Zbrozek Dep. at 208:18-209:11.) He testified that a bulk download “in absence of context” may
10 not be suspicious, but that “someone pulling information and putting that information somewhere
11 else and then leaving the company, maybe that’s suspicious. Maybe just looking at the log files on
12 their own isn’t enough to tell that story.” (*Id.* at 230:2-16.) He also stated his expressed concerns
13 about ascribing suspicion lacked “context” surrounding Levandowski’s download, and that his
14 concern was only “about setting a precedent for that one action in isolation being in and of itself a
15 marker of suspicion.” (*Id.* at 238:23-25, 239:23-25.) Defendants omit this testimony in their one-
16 sided presentation of the “evidence” at issue.

ARGUMENT

18 I. THE JURY MUST DECIDE EVIDENTIARY CONFLICTS

19 Defendants contend that because of isolated statements about Levandowski's download
20 without context of clarifying testimony about those very statements by their author, Waymo ought
21 to be precluded from making *any* references to the download at trial. Defendants articulate no
22 ground for such preclusion. Where evidence is in conflict, it is for the jury to resolve that conflict.
23 The relief Otto Trucking seeks would not be appropriate by summary judgement much less a
24 motion in limine.

25 Instead of purporting to show an absence of evidentiary conflict, Defendants fill the first
26 two pages of their brief with jury argument about the meaning of Mr. Zbrozek's emails. (Br. 1-2.)
27 But jury argument is just that. Defendants intend to present the emails as evidence that the 14,000
28 files are supposedly of low value, and Waymo will offer evidence that the 14,000 files contain

1 Waymo's trade-secret design information, which Waymo valued because it represented Waymo's
 2 large technological head-start, a primary competitive advantage in the nascent market for self-
 3 driving car services. Defendants do not articulate why conflicting evidence about the value of
 4 stolen material should obliterate all trial evidence of the theft itself. At most, Defendants state
 5 without support that "the downloading of the 14,000 files is irrelevant," apparently on the basis
 6 that Mr. Zbrozek's statements prove that the 14,000 files do not contain Waymo's trade secrets.
 7 (Br. 3-4.) The statements prove no such thing, however, as confirmed by Mr. Zbrozek himself.

8 **II. OTTO TRUCKING'S ATTACKS ARE BASELESS AND IRRELEVANT**

9 Lacking any basis in the rules of evidence to exclude references to the download,
 10 Defendants instead launch ancillary and baseless attacks against Waymo. First, Defendants allege
 11 that Waymo "hid Mr. Zbrozek and key documents from discovery" and did not collect Mr.
 12 Zbrozek's email or documents. (Br. 2-3.) This is false. At Michael Janosko's deposition on
 13 March 23, he identified Mr. Zbrozek's as providing access to the SVN server. (Ex. 05, Janosko
 14 Dep. at 12:5-17.) Defendants served an RFP seeking Mr. Zbrozek's emails in July, well before
 15 Defendants moved for privileged documents, and Waymo complied, serving 559 documents from
 16 Mr. Zbrozek's custodial file. (Ex. 06, Waymo Responses to OT RFP No. 82; Nardinelli Decl.
 17 ¶ 9.) As to Waymo's initial disclosures, under Fed. R. Civ. P. 26(a)(1) a party must disclose
 18 individuals likely to have discoverable information "that the disclosing party may use to support
 19 its claims or defenses." Waymo did not at the time intend to use information from Mr. Zbrozek to
 20 support its claims or defenses. And Mr. Zbrozek's emails quoted by Defendants were all
 21 privileged – and therefore not discoverable, *see* Fed. R. Civ. P. 26(b)(1) (limiting the scope of
 22 discovery to "nonprivileged matter") – until the Court found waiver on August 18. (Dkt. 1272.)

23 Next, Defendants repeat the "stonewalling" complaint on the basis that Waymo acted
 24 irresponsibly by not producing privileged communications until the late stages of this litigation.
 25 (Br. 3-4.) As stated above, the Court already dismissed that allegation because Defendants waited
 26 until August 11 to raise a challenge. (Dkt 1414, 8/28 Tr. at 13:20-24.) Furthermore, contrary to
 27 Defendants' insinuation that Waymo has avoided complying with the Court's order (Br. 3), the
 28 Court itself has expressly recognized Waymo's compliance and good faith. During an August 31

1 *in camera* review of documents, the Court repeatedly found Waymo's stance to be proper, denying
 2 Otto Trucking's requests for production. (Dkt. 1441, 8/31 Tr. at 61-113.) While the Court did
 3 order some production, the Court recognized "the difficulty of the line-drawing" exercise and
 4 found that Waymo was not "trying to hide super-material information." (*Id.* at 9:10-16, 68:7-13.)
 5 And Waymo timely complied with the Court's production order. (Ex. 03, 9/2 email.)

6 **III. OTTO TRUCKING PROVIDES NO BASIS TO PRECLUDE WAYMO FROM
 ARGUING THAT LEVANDOWSKI'S ACTS WERE SUSPICIOUS**

7 Defendants ask the Court to preclude any suggestion "that this downloading was
 8 anomalous" on the lone ground that Waymo has not supplied sufficient log data. (Br. 4.) As the
 9 Court has recognized, however, the circumstances surrounding Levandowski's download present
 10 cause for alarm without any reference to log data of other Waymo employees: "You take 14,000
 11 files, you wipe the computer clean, and then you leave the company. Doesn't that sound
 12 suspicious to you?" (Dkt. 160, 4/5 Tr. at 13:12-14.) Defendants do not explain why the Court
 13 was incorrect and why absent additional log data pertaining to other personnel, the Court must
 14 exclude all references to the download's anomalous nature rather than allow Waymo to present its
 15 case and Defendants to present theirs. Further, Waymo *has* produced extensive log data, including
 16 the full SVN log data in its possession for not just Levandowski, but every individual who has
 17 accessed the SVN. (Ex. 07, 6/27 email.) Waymo objected to producing other log data as not
 18 proportional to the needs of the case, given the burden of collection weighed against the minimal
 19 relevance. (Dkt. 1414, 8/28 Tr. at 49:21-50:2.) If Defendants had disagreed with Waymo's
 20 position, Defendants could have moved to compel, but as the Court has recognized, Defendants
 21 did not: "So now as to the production of the log information, here's the rub: You didn't move to
 22 compel it." (*Id.* at 48:17-20.) Even after the Court invited Defendants to move to compel log
 23 data, Defendants did not. (*Id.* at 50:20-51:12.) Thus, Defendants cannot be heard to complain of
 24 any absence of log data, much less to leverage the absence of data into a ruling from this Court to
 25 strike all argument about the anomalous nature of Levandowski's download.

26 **CONCLUSION**

27 For the foregoing reasons, the Court should deny Defendants' Motion in Limine No. 26.

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2 DATED: September 13, 2017
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By /s/ Charles K. Verhoeven
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